McWhinney

UNITED NATIONS LAW MAKING

CULTURAL AND IDEOLOGICAL RELATIVISM AND INTERNATIONAL LAW MAKING FOR AN ERA OF TRANSITION

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Foreword

In 1979 Unesco launched a new collection called *New Challenges To International Law,* with the aim of encouraging critical reflection on international law to see how it can be better adapted to the demands of the contemporary world. The present volume is the third in the collection. Like the two previous volumes, it deals with a dimension of the international normative system which is characteristic of the continual process of adaptation of international law to the changing realities of international relations.

The center of the post-1945 structure of the interstate system is without doubt the United Nations Organization. Conceived to prevent the outbreak of large-scale violence and to resolve the social, economic, and political problems of the community of nations, it soon became a barometer of rising expectations of the peoples represented by governments at the United Nations and of conflictual relations among states, for a variety of reasons, including cultural and ideological ones. The process of transformation of international society manifests itself throughout the law-making activity of the United Nations, in particular in the Security Council, the General Assembly, the International Law Commission, the International Court of Justice, and through the Secretary-General.

Professor Edward McWhinney has undertaken in this book the task of analyzing the processes, arenas, and actors involved in law making in the United Nations for what he calls "an era of transition"—that is, the transition from an old system of world public order to a new one. He has brought to this task the experience of a distinguished career in teaching and writing in international law and in the practice of law, and the wisdom of an adviser to government and to international organizations. Member of the Institut de Droit International, he is a leading authority in the fields of constitutional law and new frontiers in international law. The views expressed are, of course, those of the author alone and do not necessarily reflect the opinions of Unesco.

Unesco is grateful to Professor McWhinney for preparing this volume, which will provide insights to scholars and practitioners on the evolution of the law-making process within the community.

Such a complex subject requires more than an examination of the writings of other scholars and official documents, and Professor McWhinney was able to bring to this task his experience as special adviser to the thirty-sixth, thirty-seventh and thirty-eighth sessions of the General Assembly and his firsthand observations of many of the developments described in this book. Professor McWhinney looks at the empirical evidence concerning the behavior of states and in no way underestimates the conflictual dimension in that behavior; he nevertheless also sees the emergence of a legislative process in the world community and does not hesitate to urge improvements in the law-making capacity of the United Nations. His vision is one of the adaptation of international law to the realities of this era of transition and its enforcement in the collective interests of the emerging world public order.

This vision corresponds to the aim of Unesco in this collection of publications on the new challenges facing international law of today and tomorrow. Unesco hopes this book, like the entire collection, will contribute to a better understanding of the role of law in contemporary international society and its potential in the building of a world order based on justice and solidarity.

Acknowledgments

This study is being published as part of Unesco's series *New Challenges to International Law,* inaugurated in 1979 with Judge Bedjaoui's monograph, *Towards a New International Economic Order.*

The main hypotheses were tested in preliminary form in courses of lectures I gave in French, as Professeur associé in the Faculté de Droit of the Université de Paris I (Panthéon-Sorbonne) in the spring semester of 1982, and in the Collège de France in the spring of 1983, and I owe a special intellectual debt to Claude-Albert Colliard and René-Jean Dupuy, my hosts at these two institutions.

Much of the empirical source material was obtained while I served at the United Nations as special adviser to the thirty-sixth annual session of the General Assembly in the autumn of 1981, and to the thirty-seventh annual session in the autumn of 1982. The manuscript was completed while I was University Research Professor at Simon Fraser University.

Responsibility for the present work is that of the author, and conclusions and recommendations do not necessarily reflect the opinions of any of the institutions, academic or governmental, national or international, with which the author has been associated at various times in recent years.

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Introduction: Legal Characteristics of an Era of Transition

We live today in an era of transition in the world community, from an old system of world public order to a new one. What President de Gaulle characterized as the "postwar" era in international relations—bipolarity and the twin political-military blocs or alliances, dominated respectively by the Soviet Union and the United States—is clearly at an end, without, however, the main contours and directions of the new system of world public order that will replace it having yet become clear. From Cold War through coexistence to eventual détente, the patterns of post-1945 international relations had a certain predictability and comfortable assurance, since they were based upon two main players only, the Soviet Union and the United States, each of which was manifestly rational and also relatively conservative in its approach to international decision making. There was a sufficiency of shared values, at least in the peace-keeping area; and there was a common interest in maintaining the World War II political-military settlement, already agreed upon by the wartime Big Three at Yalta in February 1945, even before the war's end, and then confirmed at Potsdam in August 1945. Beyond that, there was a mutual understanding and ability to maintain one's basic interests in the legal-institutional machinery worked out at the Conference on International Organization at San Francisco in 1945, and incorporated in the resulting United Nations Charter. For, in its specific stipulations against the so-called enemy states in Articles 53 and 107 of the new charter, not less than in the special connotation given to "peace-loving states," which was the criterion of United Nations membership—in terms of Article 4 of the charter and in actual political-administrative practice in the early years of the new

United Nations Organization—it was clear that the dominant design was to establish and maintain a postwar world public order system that would reflect as nearly as possible the historic consensus of the fleeting wartime years of the so-called wartime alliance against fascism.

Like all constitutional documents framed in fairly general terms at a particular moment in history, the Charter of the United Nations came to take on a meaning and significance not necessarily intended by its founding fathers of 1945 or corresponding to their original wishes, this in accord with rapidly changing conditions in the world community and in response to an ever widening and ever more representative (in ethnic-cultural and ideological terms) membership. Still, all through the first decade of its history, in that period of easy and automatic political dominance by the United States and its allies, with the comfortable, pro-Western majority voting coalition in the General Assembly, and thereafter with the first flood of admission of "new," newly decolonized states, before the Third World voting bloc had yet become cohesive and disciplined in its approach to political power in international organization, the Soviet Union and the United States, with only rare exceptions like the Korean crisis of mid-1950, never substantially departed from the interbloc ground rules—or mutual, tacit understanding and reciprocal tolerances—developed on an experiential basis and often painfully, by trial and error, through the difficult Cold War years. In particular, there was no real attempt to use or misuse the special parliamentary machinery of the United Nations to harass the other side beyond the point where the basic postwar settlement drawn up at Yalta and Potsdam would be challenged or threatened. To a sufficient extent the two rival bloc leaders observed the "rules of the game" in their mutual interbloc dealings and relations throughout the Cold War period; and the passage to the more tranquil period of East-West coexistence and then détente was thereby immensely facilitated and accelerated.

The passage from the era of East-West, Big Power coexistence and détente, its surface rivalries and name calling and its more frequent pragmatic compromises and political give-and-take, to the current era of transition is one of change from a tidy and predictable condition of Big Power condominium, where only two major players needed to be considered or even consulted, to a largely uncertain and frequently hazardous condition of polypolarity (multipolarity). This is characterized by a plurality of different and frequently conflicting value systems, involving both goal values themselves and also basic processual-institutional method and choice of problem-solving arenas and techniques. All this reflects the plurality of new players who have emerged in the world community since the political-legal consummation of decolonization and national self-determination throughout the late 1950s, the decade of the 1960s, and the early 1970s. The process of transfer of effective power in the world community has been assisted, during that time, by a certain manifest crisis of

confidence on the part of each of the erstwhile bloc leaders, the product in considerable part of purely internal, domestic factors unrelated to international conditions, like the Watergate crisis, which supervened in the United States just at the apogee of East-West détente in the Nixon-Brezhnev Moscow summit accords of May 1972, and which seriously weakened that element of strong executive leadership and direction in each of the two blocs on which Big Power equilibrium or balance of power, and hence coexistence and détente had always been predicated. Parallel to the crisis of internal leadership in the United States, the Soviet Union revealed an aging, increasingly timorous and unimaginative and conservative direction at the top, unable effectively to respond to, or at times even to comprehend, the winds of change within the Soviet Union and Soviet bloc and in the world community at large. The interruption, in the early and mid-1970s, of that disciplined, ongoing process of détente that had seen a plethora of concrete and substantial East-West accords in nuclear and general disarmament and on security of territorial frontiers and related questions, meant not merely a failure to complete that resolution or synthesis of East-West contradictions that had been the main political task and intellectual challenge of the postwar era, but an embarking upon a new and uncertain course in international relations without the advantages of an orderly, tidy, disciplined transition presided over and actively patronized and assisted by the Big Powers. In fact the reversion, in the late 1970s and early 1980s, to some of the ideological name calling and polemical debate that had marred the early Cold War period, and a certain willful refusal at the higher executive levels on both sides to apply the pragmatic, empirical, problem-oriented, step-by-step approach that had highlighted the successful road to détente throughout the 1960s and the early 1970s, has complicated the quest for a new, politically viable world public order system to tide us over the remaining years of the twentieth century.

A polypolar world community with a plurality of significant players, representing in their turn a plurality of different ethnic-cultural and ideological systems, each with its own distinctive legal values and methodologies of legal problem solving, which will sometimes be the same or complementary and sometimes dissonant or in direct competition with each other, means a congeries of different legal relationships in any given problem situation. Thus, some aspects of a given problem may involve vestigial East-West, bipolar clusters of legal rules and principles; some others, by now already anachronistic European imperial-colonial clusters; still others, Latin American, intra-hemispheric "regional" rules and principles, or, for that matter, "new" North-South development law norms. Characterization of the problem is the key to successful legal problem solving, in that it permits determination of the substantive legal values to be applied and the legal techniques and processes best suited for

implementing those values. And yet different players today will characterize the same problem in different ways, involving different legal value choices and different legal procedures. At the processual-institutional level, the problem is compounded when particular institutions—Security Council, General Assembly, International Court, for example—and also different problem-solving methods—diplomatic negotiation, third-party arbitration, judicial decision making, for example—are identified with particular time periods in the history of the world community and with the particular social and economic forces or ethnic-cultural groupings that then were dominant. In terms of substantive value choice, the resolution of the axiological problem implies a particular *Weltanschauung* or conception of world history that is ultimately related to one's prediction of the movement and direction of societal change in the world community today. The alternative developmental constructs or projections of such long-range historical trends become vital to the exercise of an informed policy choice in international legal decision making.

It is easier, in an era of transition, to identify time past—the old legal values and institutions of yesterday or the day before yesterday—than to try with any real confidence to postulate the legal values and institutions of the world community of, say, the few years ahead now to the year 2000. Historical determinists with optimistic conceptions of a continuing unfolding or development of human powers and human civilization are forced to admit, like J. Kohler, the possibility of "retrogressive civilizations," even if they cannot always identify them in advance. Both Western and Marxist legal theorists had no difficulty in agreeing, each group with its own distinctive legal value systems, that the postrevolutionary, fundamentalist Islamic religious regime in Iran was historically retrogressive; and both systems, Western and Marxist, either directly opposed the Ayatollah Khomeini's administration or else rendered little more than grudging deference and respect for the Iranian people's right to self-determination. The legal appraisal or characterization in each case, however, was historically relativist, reflecting the particular a priori ideological preconceptions of particular postindustrial societies, Western and Soviet, at particular stages of their own social and economic development. Neither system, Western or Soviet, has any claims to a monopoly on legal truth, which presumably, in the case of Iran, will be determined dialectically by the rise and fall of the contending political and social forces there. Truth, as William James, the founder of American pragmatism and an intellectual precursor of North American sociological jurisprudence, remarked, is not an abstract quality inherent in an idea, but something that happens to it, experientially, in action. What we can do is to try to project time past, in terms of legal values and institutions and processes, through time present—both of these capable of empirical ob-

servation and verification—and arrive at a more or less scientific extension into time future and the values, institutions, and processes of tomorrow. If this tends to mean the reign of scientific relativism—sociological jurisprudence, and the criterion of the goodness in law as its ability to reflect the dominant interests and demands in society at any time—a necessary corrective can be, and is being, applied by the increasing transcultural, intersystemic consensus manifest as to a certain minimum number of fundamental legal principles and rules—general principles of law common to all systems, to paraphrase the words of the listing of formal "sources" of law in Article 38 of the International Court of Justice statute. An era of transition in the world community, such as the one we live in today, can thus produce its own world "living law," *jus gentium,* natural law–style corpus of principles and rules. Some of these—very many, in fact—are clearly drawn from the "old" classical, Western or Eurocentric international law; some from comparative law, through comparative scientific-legal method and analysis and induction (common law and civil law; European and non-European; Communist and Western [liberal democratic, or social democratic] as the case may be); and some directly from that "new" international law emerging in the postwar period. If political decolonization and national self-determination have clearly attained, by now, a degree of general, if not indeed universal, recognition as fundamental principles of modern international law, recognition of national sovereignty over national economic and natural resources, and acceptance of human rights (political, social, and economic) are increasingly recognized today as the proper concerns of any mature legal system, international or national.